No. 15,108

United States Court of Appeals

For the Ninth Circuit

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch, Lytle & Green,

Appellants,

vs.

L. A. MARTIN,

Appellee.

L. A. MARTIN,

Appellant,

vs.

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch, Lytle & Green,

Appellees.

BRIEF OF CROSS-APPELLANT L. A. MARTIN.

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STATEMENT OF PLEADINGS AND JURISDICTION.

For the purposes of this cross appeal, cross-appellant adopts the statement on pleadings and jurisdiction as set out in the brief of appellants.

STATEMENT OF THE CASE.

The facts for the purpose of this cross appeal are the same as are set forth in the appellees' brief herein. In addition to the facts set forth in appellees' brief, however, the following facts are pertinent to the question of remittitur.

On October 31, 1955, upon a hearing on various motions, the Court entered the following order, quoted in part herewith (R 58-59):

> "Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, denied motions for Judgment for Birch, Lytle & Green, and motions for judgment in accordance for Directed Verdict, as to Defendants Bell and Weber, and Motion in alternative for New Trial as to Defendants, Bell and Weber; reserved its decision as to question of Remittitur and counsel for Defendants, Birch, Lytle and Green given to the 20th day of November, 1955 within which to file brief on question of remittitur, counsel for plaintiffs to have ten (10) days thereafter within which to file answering brief."

Then on December 30, 1955, the Court entered an order on the question of a remittitur, the pertinent part of said order is quoted herewith. (R 60-61.)

> "It Is Ordered that motion for new trial, be, and it is hereby denied as to all defendants provided that in cause No. A-8237, L. A. Martin will make a remittitur on the verdict under compensatory damages in the sum of $2,500. . . ."

Following the last indicated order a consent to remittitur was filed for the cross-appellant on the 6th day of January, 1956.

Then on January 17, 1956, a judgment was filed and entered based upon the verdict of the jury and the order of remittitur. (R 62-65.)

Following a notice of appeal by the appellants, who are the appellees for the purpose of this cross-appeal, the notice of cross appeal was filed on behalf of the cross-appellant, with said notice of cross-appeal duly and timely filed.

SPECIFICATIONS OF ERROR.

1. That the Remittitur ordered in this case as an alternative to a new trial was inconsistent with the jury instructions given by the Court.

2. That a motion for a new trial had already been denied when the Remittitur as an alternative to a new trial was ordered.

3. That the Remittitur was not based upon such error as to order a Remittitur as an alternative to a new trial.

4. That the Remittitur was not based upon any reason and was arbitrary.

5. That the Remittitur in this case was ordered as an alternative to a new trial in this case and in the case bearing docket number 8212, entitled Robert L. Martin versus S. Birch & Sons, et al., thereby placing

the burden of the conditions of two cases upon Cross-Appellant.

ARGUMENT.

I.

THAT THE REMITTITUR ORDERED IN THIS CASE AS AN ALTERNATIVE TO A NEW TRIAL WAS INCONSISTENT WITH JURY INSTRUCTIONS GIVEN BY THE COURT.

The Court erred in granting a remittitur in this case since such action is inconsistent with the instructions given by the Court to the jury. If the jury had failed, in any respect, to follow the instructions of the Court, then it might be argued that a remittitur could possibly lie to cure the defect. No such failure on the part of the jury has been shown.

In Instruction No. 3, at page 24 of the record, the Court clearly sets forth the demands of the plaintiff in this suit. The Court also sets forth the summary of the answer, wherein the defendants denied liability and alleged contributory negligence. Then in Instruction No. 5, at page 26 of the record, the Court leaves it up to the jury to determine the amount to be awarded the plaintiff, with the pertinent part quoted as follows:

> "In that event, it is your duty to determine from the evidence what sum plaintiff is entitled to recover as damages by reason of the alleged injuries caused by defendants . . ."

Thus, the Court has indicated what the plaintiff is asking and then tells the jury that it is up to the jury

to determine the amount that the plaintiff can recover if he proves his case. Again, in Instruction No. 25, at page 41 of the record, the Court further instructs the jury that it is the duty of the jury to determine the amount and the pertinent part of the instruction is quoted:

> "In such circumstances, the jury has the duty to arrive at the proper amount of damages for physical injury or physical or mental pain and suffering by the direct testimony, by inferences drawn from the evidence and from the common knowledge and experience which members of the jury possess of men and life."

From the foregoing, it can be seen that the Court has instructed the jury that the jury is to determine the amount to be given to this plaintiff if he proves his case. Then after the jury has determined the amount, in accordance with the instructions, the Court has ordered a remittitur as an alternative to a new trial.

II.

THAT A MOTION FOR A NEW TRIAL HAD ALREADY BEEN DENIED WHEN THE REMITTITUR AS AN ALTERNATIVE TO A NEW TRIAL WAS ORDERED.

On October 12, 1955, the defendants filed a motion for judgment for defendant Birch, Lytle & Green. This motion included as an alternative, a motion for a new trial as follows (R 53):

> "In the alternative, the defendants Birch, Lytle & Green pray for a new trial in this matter, and

in the further alternative the defendants Birch, Lytle & Green move for an order of remittitur or reduction of judgment consistent with the proof of the plaintiff . . .''

This motion was argued on October 31, 1955, and the Court apparently disposed of the motion, but did reserve its decision as to the question of remittitur. (R 57-59.) Thus it appears that the Court disposed of the defendant Birch, Lytle & Green's motion, but reserved decision on remittitur. It should be noted, however, that a minute order was entered on December 30, 1955, which did condition the denial of the motion for a new trial upon the remittitur in cause No. A-8237. (R 60.) However, the question of remittitur should have been moot at that time.

III.

THAT THE REMITTITUR WAS NOT BASED UPON SUCH ERROR AS TO ORDER REMITTITUR AS AN ALTERNATIVE TO A NEW TRIAL.

THAT THE REMITTITUR WAS NOT BASED UPON ANY REASON AND WAS ARBITRARY.

The Court erred in granting a remittitur without showing some error that the remittitur would be presumed to correct, and without giving any reason for the ordering of a remittitur.

No opinion was given as to why a remittitur would be ordered in this particular case and nothing in the record indicates any possible reason for the granting

of a remittitur. The minute order, granting the remittitur as an alternative to a new trial, appears at pages 60-61 of the record. The pertinent part of the minute order is as follows:

> "It is ordered that motion for new trial, be, and it is hereby denied to all defendants provided that in cause No. A-8237, L. A. Martin will make a remittitur on the verdict under compensatory damages in the sum of $2,500."

No error on the part of the jury, nor error on the part of the Court was discussed, cited or urged by defendants to support the granting of a remittitur.

An excessive verdict by the jury appears to be the main reason for the granting of remittiturs and it appears that this is true under the Federal Rules of Civil Procedure. The remittitur is ordered as an alternative to a new trial under Rule 59. The following are head notes from Federal Court cases supporting this rule:

> "Amount of damages to be awarded to plaintiff in action for injuries is primarily a question of fact for jury, but if trial judge is convinced that amount of damages fixed by jury is too high he can properly ask for a remittitur as an alternative to his granting a new trial." *Fiedler v. Chicago and N.W. Ry. Co.,* 204 F 2d 515.

> "Where excessive damages are awarded in tort action trial court may not arbitrarily reduce damages but must afford plaintiff opportunity to make remittitur if plaintiff desires and must grant a new trial if plaintiff does not make remittitur." *Bucher v. Krause,* 200 F 2d 578.

"A trial judge has the power to remedy the injustice of an excessive award by insisting on a remittitur as an alternative to a new trial." *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.,* 191 F 2d 303.

"Where court considers verdict returned in favor of the plaintiff as excessive, proper procedure is not to grant a new trial absolutely but only conditionally, with an order of remitter." *Magee v. General Motors Corp.,* 117 F. S. 101; vacated on other grounds, 213 F 2d 899.

"Where court considers verdict returned in favor of the plaintiff as excessive, proper procedure is not to grant a new trial absolutely but only conditionally, with an order of remitter." *Grobengieser v. Clearfield Cheese Co., Inc.,* 94 F. S. 402.

"Where jury, after being properly instructed by court, returns an excessive verdict, court, in exercise of its judicial discretion, may make a conditional order granting a new trial unless the plaintiff remits the excess." *Fornwalt v. Reading Company,* 79 F.S. 921.

Another case similar to the cases last above cited is *Rice v. Union Pacific RR Company,* 82 F.S. 1002, which holds, among other things, as follows:

"Where verdict and judgment awarding damages for personal injuries are clearly excessive, district court may deny a motion for a new trial upon condition that successful party remit and release a portion of the verdict and judgment found to be in excess of the highest appropriate recovery and in default thereof grant a new trial."

This case also points out at pages 1007 and 1008 that the Supreme Court has approved the power of the Court to condition the denial of a new trial on a remittitur. The two leading Supreme Court cases on this point are *Northern Pacific Ry. Co. v. Herbert,* 116 U.S. 642 and *Dimick v. Schiedt,* 292 U.S. 474. It should be noted, however, that the remittiturs in these cases are based upon the determination that the verdict is excessive. And in the *Rice* case, this question is discussed throughout the opinion with the Court using such expressions as "in aid of the Court's consideration of the attack upon the amount of the verdict, . . ." and "from that study the Court has concluded that the verdict is excessive . . ." and "on the other hand, the verdict and judgment should not be allowed to stand, in the face of the determination that they are clearly excessive . . ." It is this very point in which the case at bar differs from the cases cited, and that is that there has never been a determination that the verdict in this case was excessive, *not even by inference.*

The rule indicated by the above quoted Federal cases could well be the rule in Alaska, since excessive damages is one of the grounds under the Alaska Statute. The Statute is quoted: Sec. 55-7-132 A.C. L.A. (1949):

> "The former verdict or other decision may be set aside and a new trial granted, on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

"First. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which such party was prevented from having a fair trial;
"Second. Misconduct of the jury or prevailing party;
"Third. Accident or surprise which ordinary prudence could not have guarded against;
"Fourth. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
"Fifth. Excessive damages, appearing to have been given under the influence of passion or prejudice;
"Sixth. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;
"Seventh. Error in law occurring at the trial and excepted to by the party making the application."

If the remittitur in this case was ordered as an alternative to a new trial because of excessive damages, it appears that it would also have to be "excessive damages, *appearing to have been given under the influence of passion or prejudice . . .*" (Emphasis supplied.) This is the Alaskan Statutory ground under excessive damages, and in view of Rule 59 of the Federal Rules of Civil Procedure, wherein a new trial may be granted "(1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of the United States . . .", it appears

that excessive damages, appearing to have been given under the influence of passion or prejudice would be a ground upon which to move for a new trial. The defendants have not only failed to mention the question of excessive damages but have never suggested the influence of passion or prejudice. For that matter, the defendants have never alleged any ground in their motion for a new trial and motion for an order of remittitur except to state that the punitive damages should never have been submitted to the jury. The defendants' motion for the remittitur as an alternative to a new trial is included in their motion for judgment for defendants Birch, Lytle & Green and that part pertinent to the remittitur appears on page 53 of the record. The pertinent paragraph is quoted in full:

> "In the alternative the defendants Birch, Lytle & Green pray for a new trial in this matter, and in the further alternative defendants Birch, Lytle & Green move for an order of remittitur or reduction of judgment consistent with the proof of the plaintiff, which remittitur should reduce the recovery of the plaintiff in any event to not more than $2500.00 and should as a matter of course order the remittitur of punitive damages which should never have been submitted to the jury as these defendants believe under the facts and the law."

Since Alaska does have a statute authorizing a new trial, the case decisions on this point should also be considered. In 88 A.L.R. 943, the constitutionality of statutes relating to excessiveness or inadequacy of

damages is discussed and at page 954, under the heading "Statute authorizing new trial where award is prompted by passion or prejudice", is a discussion that should apply to the Alaskan Statute allowing new trial for inadequacy damages. The annotation refers to two cases that holds as follows, at page 955:

> "To warrant a new trial under a statute authorizing such trial where excessive damages appear to have been given under the influence of passion and prejudice, it must appear not only that the damages are excessive, but that they were given under the influence of passion and prejudice." *Denver and RGR Co. v. Heckmann* (1909), 45 Colo. 470, 101 Pac. 976.
>
> "Under such a statute it has been held that the jury having determined such damages, the court cannot order a new trial because it deems them excessive, unless it can clearly be said that the verdict of the jury is so grossly excessive that it manifestly appears that it must have been given under the influence of passion or prejudice." *Carpenter v. Dickey* (1913), 26 N.D. 176, 143 Northwest 964.

Both of these cases cited in the annotation are directly in point, under any discussion of excessive damages, for the reason that the Alaskan Statute on excessive damages, is qualified "appearing to have been given under the influence of passion or prejudice . . ." Thus, if excessive damages were the determining factor, it appears that there would have to be at least some showing of passion or prejudice. The exact opposite appears to be the case here. The plaintiff, L. A. Martin, asked for Forty Thousand Dollars ($40,000.00)

actual damages and Twenty-five Thousand Dollars ($25,000.00) punitive damages in his complaint, or for a total of Sixty-Five Thousand Dollars ($65,000.00). However, the jury awarded the plaintiff the total sum of Nine Thousand Dollars ($9,000.00), *which is less than one-seventh of the amount asked.* It should also be noted that the jury verdict was brought in after a long deliberation (R 62). It should be further noted that the verdict in the case herein was less than the amount of the verdict in the case which was consolidated with this case for trial. In view of the foregoing and of the evidence of serious injuries inflicted upon the plaintiffs, there is little, or no possibility of passion and prejudice having affected the verdict.

Some confusion may result from the discussion of the Alaskan Statute on motion for new trial, since it is indicated in Barron & Holtzoff Federal Practice and Procedure, Volume 3, at page 223, that

> "The grant or denial of a new trial is a matter of procedure governed by these rules and not by state law or practice."

This statement is supported by case authority, but there may be some question as to whether or not this rule would be applicable in Alaska, for the reason that Alaska does not have the separate system of Courts, such as prevails in the States. There is only one Court in Alaska, namely, the District Court for the District of Alaska, although this one Court does operate in something of a dual capacity administering both Territorial and Federal Law. However, there has never been a distinction drawn between Territorial as dis-

tinguished from Federal jurisdiction. Undoubtedly, the matter should be decided by determining whether or not the Alaskan Statutes are inconsistent with the Federal Rules of Civil Procedure and, if the Alaskan Law is inconsistent, then the Federal Rules should prevail.

Another Alaskan Statute that should be considered with respect to the motion for new trial, is Section 55-7-135 ACLA (1949), which is quoted herewith:

> "Statement of grounds: Affidavits. In all cases of motion for a new trial the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subdivisions one, two, three, or four of section 55-7-132, it shall be upon affidavits setting forth the facts upon which such motion is based, unless they appear of record in the cause."

Under this particular statute, it appears that any grounds for new trial would have to be plainly set forth. Since none were set forth in this case, anywhere, there apparently are no grounds for new trial and therefore a remittitur could not be granted as an alternative to a new trial.

With respect to the question of grounds for a new trial, it should also be noted that the Court itself may order a new trial on its own initiative. The rule is clearly set forth in 3 Barron and Holtzoff, Federal Practice and Procedure, at page 223, Section 1302. The first paragraph is quoted:

> "Under rule 59 (d) the court 'of its own initiative may order a new trial for any reason for which

> it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor'. The burden of showing prejudicial error rests on the party moving for a new trial."

This rule is supported by *Freid v. McGrath,* 133 Fed. 2d 350, wherein the Court stated at page 355:

> "When the new trial is granted upon motion of a party, *the grounds appear in the motion,* as the reasons assigned by the movant in compliance with the requirements of Rule 59 (a). When the judge acts of his own initiative he must set out *the grounds in his order.* Otherwise, the purpose of the rule will not be accomplished; the record will not reveal the basis upon which the order is made or permit intelligent review by an appellate court . . ." (Emphasis supplied.)

Another case holding that the District Court must specify the grounds for granting a new trial on a motion, is *Youdan v. Majestic Hotel Management Corporation,* 125 Fed. 2d 15, and for a case holding that the burden of showing prejudicial error rests on the parties moving in for a new trial, see *Moran v. Pittsburgh-Des Moines Steel Company,* 86 F.S. 255.

In the case herein, the grounds for the motion were not only missing, but the District Court also failed to set out the grounds in his order. The omissions are apparently due to the non-existence of any legal theory to use as grounds for the motion.

For an Alaskan case on the question of excessive verdict see *Linge's Administrator v. Alaska Treadwell Company,* 3 Alaska 9, and on this particular point the Court stated at page 13:

> "If the verdict be excessive, the power to disturb it rests in the discretion of the Court. But this discretion does not supplant that of the jury. The Court must decide whether there is enough evidence to support the verdict, and if there is sufficient the discretion of the court ceases . . ."

It should also be noted that this case discusses the grounds of the motion for a new trial and indicates that the Court will not consider the motion for new trial unless the motion plainly specifies grounds for the motion.

The foregoing discussion on excessive damages has been presented to show that a remittitur could not be supported on such a theory, even though the question was never presented in the lower Court. An even better reason why a remittitur would not be in order is that the total verdict of $9,000.00, awarded cross-appellant by the jury, was not excessive in any sense in view of the injuries sustained by cross-appellant.

The cross-appellant was so brutally beaten that he was in a semi-conscious condition for approximately five (5) days (R 166, 194). The doctor who treated cross-appellant testified with respect to the beating injuries, in part (R 193):

> "It was my opinion that it was sufficient to cause brain damage which might manifest itself in headaches, dizzy spells and possible permanent changes."

Although this doctor did not treat the patient further, there was evidence introduced on such brain damage. (See statement of case.)

IV.

THAT THE REMITTITUR IN THIS CASE WAS ORDERED AS AN ALTERNATIVE TO A NEW TRIAL IN THIS CASE AND IN THE CASE BEARING DOCKET NUMBER 8212, ENTITLED ROBERT L. MARTIN VERSUS S. BIRCH & SONS, ET AL., THEREBY PLACING THE BURDEN OF THE CONDITIONS OF TWO CASES UPON CROSS-APPELLANT.

On December 30, 1955, the lower Court entered a minute order in this case denying motion for new trials; granting motion for remittitur, and denying motion for allowance of attorneys' fees and Court costs toward defendants Wise and McDonald (R 60). The Court cited the two cases which had been consolidated for trial, namely No. A-8212 and entitled Robert L. Martin, Plaintiff, vs. S. Birch & Sons, a corporation; C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch, Lytle & Green, Ross McDonald, Joe Sipes, J. P. Bell and R. E. Wise, Defendants, in case No. A-8237, which was entitled L. A. Martin, Plaintiff, vs. S. Birch & Sons, a corporation; D. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch, Lytle & Green, Ross McDonald, Joe Sipes, J. P. Bell and R. E. Wise, Defendants.

Then the Court disposed of all of the motions which concerned both plaintiffs and all the defendants with the following order:

> "It Is Ordered that motion for new trial, be, and it is hereby denied as to all defendants provided that in cause No. A-8237, L. A. Martin will make a remittitur on the verdict under compensatory damages in the sum of $2,500. . . ."

Thus, it appears that the motion for a new trial in both cases was to be denied if the cross-appellant herein, alone, would consent to a remittitur. The cross-appellant did submit to the remittitur, in order to avoid a new trial, but the determination was arbitrary and not based on any given reason.

It might be argued that the damages sustained by cross-appellant were not sufficiently proved. However, the cross-appellant was seriously injured and it does not appear that lack of proof as to damages was the reason for this action. It should also be noted that the evidence for both cases was the same.

There appears to be little or no case authority concerning this particular point. It could well be that the rule holding that the denial of a new trial in one case could not be conditioned upon the filing of a remittitur in another is so elementary that the point has escaped discussion to date.

CONCLUSION.

In conclusion the cross-appellant submits that the judgment herein should be modified with an order to the Court below to disallow the remittitur and to enter judgment in accordance with the jury verdict.

Dated, Anchorage, Alaska,
January 2, 1957.

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